Supreme Court, U.S.
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No. 93-232

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

JOHN A. LUPARELLI, Administrator of the Estate of RICHARD R. LUPARELLI, Deceased,
Petitioner

v.

CARLETTA J. SOHN and JONG SOO SOHN,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Brief in Opposition	1
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Cleburne v. Cleburne Living Center,
473 U.S. 432, 105 S.Ct 3249,
87 L.Ed.2d 313 (1985) 2

Costa v. Lauderdale Beach Hotel,
___ Pa. ___, 626 A.2d 566 (1993) 1, 3, 5

Craig v. Magee Memorial Rehabilitation
Center, 512 Pa. 60, 515 A.2d 1350 (1986) 1

Dietrich v. J.I. Case Co.,
390 Pa.Super. 475, 568 A.2d 1272 (1990) 1

Dranzo v. Winterhalter, 395 Pa.Super. 578,
577 A.2d 1349 (1990) appeal denied,
526 Pa. 648, 585 A.2d 468 (1991) 1

Knight v. Tape, Inc.,
935 F.2d 617 (3d Cir., 6/7/91),
rehrg. den. (7/29/91) 1, 2, 5

Laudenberger v. Port Authority of
Allegheny County, 496 Pa. 52,
436 A.2d 147 (1981) 1, 2, 3, 5

TABLE OF AUTHORITIES – *(Continued)*

Cases:

Rogin v. Bensalem, 616 F.2d 680
(3rd Cir. 1980), *cert. denied,*
450 U.S. 1029, 101 S.Ct. 1737,
68 L.Ed.2d 223 (1981) 2

Schrock v. Albert Einstein Med. Ctr.,
386 Pa.Super. 215, 562 A.2d 875 (1991) 4

Schrock v. Albert Einstein Med. Ctr.,
527 Pa. 191, 589 A.2d 1103 (1991) 5

Shellhamer v. Grey, 390 Pa.Super. 122,
568 A.2d 224 (1989) 1

Simmons v. City of Philadelphia,
947 F.2d 1042 (3rd Cir. 1991) 1

Trans-Global Alloy, Ltd. v. First
National Bank of Jefferson Parish,
583 So.2d 443 (La. 1991) 5

BRIEF IN OPPOSITION

Petitioner questions the constitutionality of Pa.R.C.P. No. 238 under the due process and equal protection clauses of the Fourteenth Amendment. All of the constitutional issues which his petition raises been considered and rejected by the Supreme Court of Pennsylvania, [1] the Superior Court of Pennsylvania, [2] and the Court of Appeals for the Third Circuit. [3] Petitioner has not asserted any argument which would require this Honorable Court to overrule those

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[1] **Laudenberger v. Port Authority of Allegheny County**, 496 Pa. 52, 436 A.2d 147 (1981) [Former Rule 238 valid under both the state and federal constitutions]. The rationale of **Laudenberger** was specifically preserved by **Craig v. Magee Memorial Rehabilitation Center**, 512 Pa. 60, 515 A.2d 1350, 1353 (1986), and reiterated in **Costa v. Lauderdale Beach Hotel**, ___ Pa. ___, 626 A.2d 566, 568 (1993).

[2] See **Dranzo v. Winterhalter**, 395 Pa.Super. 578, 595, 577 A.2d 1349, 1357 (1990) appeal denied, ___ Pa. ____, 585 A.2d 468 (1991); **Dietrich v. J.I. Case Co.**, 390 Pa.Super. 475, 489-91, 568 A.2d 1272, 1279-80 (1990) and **Shellhamer v. Grey**, 390 Pa.Super. 122, 129, 568 A.2d 224, 228 (1989).

[3] **Knight v. Tape, Inc.**, 935 F.2d 617 (3d Cir., 6/7/91), rehearing den. (7/29/91). The complete history of Rule 238 is reviewed in Judge Becker's thorough opinion. See also, **Simmons v. City of Philadelphia**, 947 F.2d 1042 (3rd Cir. 1991).

well-reasoned decisions. Consequently, there is no reason why the petition should be granted.

Legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. ***Cleburne v. Cleburne Living Center,*** 473 U.S. 432, 439-40, 105 S.Ct 3249, 3254, 87 L.Ed.2d 313 (1985).

The Supreme Court of Pennsylvania, in ***Laudenberger v. Port Authority of Allegheny County, supra,*** held that Rule 238 did not violate substantive due process because the rule was rationally related to legitimate state goals of promoting settlements and relieving court congestion and delay. ***Id.*** at 70-1, 436 A.2d at 156-7. ***Cf. Rogin v. Bensalem,*** 616 F.2d 680, 689 (3rd Cir. 1980), ***cert. denied,*** 450 U.S. 1029, 101 S.Ct. 1737, 68 L.Ed.2d 223 (1981). It cannot be disputed that such goals are a proper concern of the Supreme Court of Pennsylvania.

The Court of Appeals for the Third Circuit held that Rule 238 rationally promotes the goal of motivating settlements to reduce court delay by providing a financial incentive for defendants to make a reasonable offer of settlement, which the court found to be a sufficiently rational nexus to satisfy due process. ***Knight v. Tape, Inc.,*** 935 F.2d 617, 627-8 (3rd Cir. 1991). The decisions cited in footnotes 1 to 3 also found that the rule did not violate the equal protection clause in that there were sufficient rational

differences in the circumstances of plaintiffs and defendants to justify the classification and the differences in treatment under the rule. [4]

All defendant's insurer had to do to avoid having to pay delay damages to respondents was to comply with Rule 238's modest requirements: Make a written offer to settle for a specific sum within 80 per cent of the ultimate verdicts and keep it open for at least ninety days, or until trial if that should occur earlier. If respondents rejected such an offer, they would forfeit any additional delay damages for the period the offer was outstanding. By taking such simple action, wholly within its own control, it could have precluded the successful plaintiffs from recovering delay damages thereafter. It could keep whatever income it derived from plaintiffs' damages during the period that it retained those damages. Correspondingly, plaintiffs would gain nothing by making an excessive demand: they would lose delay damages as well as income they could have derived from the funds of an earlier settlement.

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[4] In **Laudenberger** the Pennsylvania Supreme Court found that Rule 238 did not offend equal protection because the distinction between plaintiffs and defendants was reasonable: "the plaintiffs have been wrongly injured and have suffered financial losses because of the defendants' action". *Id.* at 68-9, 436 A.2d at 156-7; followed, **Costa v. Lauderdale Beach Hotel**, *supra*, at 626 A.2d 569.

There is nothing "unfair" to petitioner in this system nor does it deny them equal protection of law. Both parties run the risk of losing additional money if their respective evaluations of the case are too far off the mark, that is, the ultimate verdict. But while awaiting the trial that produces that verdict, the defendant's insurer gets to keep and invest the money. If the income it derives from it is greater than the delay damages it ultimately must pay, it has profited. If the income is equal to or less than the delay damages, it has a complete offset or, at least, a reduction of such damages. See, **Schrock v. Albert Einstein Med. Ctr.**, 386 Pa.Super. 215, 562 A.2d 875, 877 (1991), aff'd, 527 Pa. 191, 589 A.2d 1103, 1106-7 (1991). Plaintiffs do not have a corresponding offset when they overvalue their damages.

In short, inability to settle a case early because of faulty evaluations actually hurts plaintiffs more than it does defendants, even if the latter must ultimately pay damages for the delay of trials not caused by defendants, but unavoidably caused by judicial administration.

The petition's repeated references to the damages assessed in this case as "50 per cent of the jury award" are inexact and may be misleading. Delay damages were assessed at the "prime rate plus 1", simple interest, as determined at the beginning of each year following the filing of the Complaint on July 28, 1986, until the verdicts were rendered on

April 18, 1991. [A-23,24]. It is quite likely that during this period defendant's insurer was able to earn more than that rate, compounded, on the sums for which defendant was found liable to plaintiffs. *Costa v. Lauderdale Beach Hotel,* ____ Pa. ____, 626 A.2d 566, 569 fn. 6 (1993)[Delay damages prevents such unjust enrichment of defendants]. It is certain that the plaintiffs were deprived of their damages over those years and lost whatever income those funds could have generated during the period that payment was delayed by the insurer. *Knight v. Tape, Inc.*, 935 F.2d 617, 628-9, fn. 11 (3rd Cir. 1991); *Laudenberger v. Port Authority of Allegheny County,* 496 Pa. 52, 65-6, 436 A.2d 147, 154-5 (1981). *See also, e.g. Schrock v. Albert Einstein Medical Center,* 527 Pa. 191, 589 A.2d 1103 (1991); *Trans-Global Alloy, Ltd. v. First National Bank of Jefferson Parish,* 583 So.2d 443, 457-8 (La. 1991).

While Rule 238 is intended to motivate both parties to make realistic offers of settlement while awaiting trial, it is also designed to provide financial motivation for both parties to avoid actions or inaction which cause delays in the scheduling of trials. The rule provides a rational means of relieving court congestion, while remedying to some degree the unjust enrichment of defendants and the financial damage suffered by plaintiffs caused by the delays in reaching trial. *Laudenberger v. Port Authority of Allegheny County,* 496 Pa. 52, 68-9, 436 A.2d 147, 156 (1981).

Contrary to petitioner's assertion at p. 7 of his Petition, the trial court ***never*** ruled that Pa.R.C.P. No. 238 required an ***"automatic"*** imposition of delay damages against petitioner. The rule itself provides for a hearing, when an issue of fact exists, before any delay damages are awarded. It states, 'If an issue of fact is raised the court may, in its discretion, hold a hearing before entering an appropriate order." [Petition, p. 5]. Defendant's lack of fault in causing delay and plaintiffs' unwillingness to reduce their demand in light of the defendant/insurer's offers were facts admitted by plaintiffs, so there was no factual issue to be decided. The trial court's award of damages for delay was entered after full and cogent consideration of the admitted facts and the arguments advanced by petitioner in his pleadings and briefs. The award was not "automatic" although Rule 238, under the admitted facts, required the award of delay damages.

The petition is also misleading in representing that "petitioner had continually attempted to settle the case throughout the litigation". [A-7]. In this case defendant admitted liability,[5] yet the defendant's insurer made only three inadequate offers of settlement during the six years and two months that followed the subject accident: $35,000.00 on June 10,

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[5] Luparelli had struck the Sohn's vehicle head-on on their side of the road in the course of attempting to pass another vehicle.

1988, [A-29]; $46,000.00 on July 14, 1988, [A-31] and $50,000.00 on January 22, 1991, [A-23]. Each of the three offers were rejected immediately by the Sohns. In light of the evidence of Carletta Sohn's permanent injuries and residual disabilities, her life expectancy of 38.4 years and plaintiffs' out-of-pocket losses, [6] plaintiffs' rejections of defendant's offers and their demand of $250,000.00 were justified.

The defendant/insurer in this case has not been deprived of *its* property without due process of law. The "property" to which it refers consists of part of its income on the $72,500.00 in damages owed to plaintiffs, as determined by the verdicts, which it detained for over six years. Neither substantive nor procedural due process was violated when Rule 238 was applied to secure restitution of the full indebtedness; nor has petitioner been deprived of the equal protection of the law by the mandates or the administration of Rule 238.

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[6] At the time of the settlement conference of January 22, 1991, the Sohn's medical expenses totalled $20,195.44, of which $10,000.00 had been paid by their own insurance (the limits of their "No-Fault" coverage). Their lost earnings totalled $15,054.33, of which their own insurance covered and reimbursed them for $5,000.00. [A-13, fn.1, and Plaintiffs' Settlement Conference Memorandum]. Therefore, their unreimbursed economic losses totalled $20,249.77. The insurer offered them $50,000.00 in settlement.

Conclusion

For the foregoing reasons, respondents respectfully this Court to deny the petition for a writ of certiorari to the Superior Court of Pennsylvania.

Respectfully submitted,

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